

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,
v.

10 RYAN ALBERT DODD (1),
TERRENCE LEROY HISSONG (2),
11 PATRICK BRADLEY BRANNAN (3),
STEPHANIE HILTON LIVESEY (4),
12 GLENDA MICHELLE DAVIS (5),
KENNETH ALAN BAIRD (6),
13 JAMES MICHAEL HAY (7),
PERRY MARK HOWARD (8),
14 MARK NORRIS JOHNSON (9), and
DANIEL PAUL NIEBUHR (10).

Defendants.

No. CR-13-6016-EFS-01
CR-13-6016-EFS-02
CR-13-6016-EFS-03
CR-13-6016-EFS-04
CR-13-6016-EFS-05
CR-13-6016-EFS-06
CR-13-6016-EFS-07
CR-13-6016-EFS-08
CR-13-6016-EFS-09
CR-13-6016-EFS-10

ORDER ENTERING RULINGS FROM
SEPTEMBER 4, 2013 MOTION HEARING

A motion hearing occurred in the above-captioned matter on September 4, 2013. Assistant U.S. Attorney Sean McLaughlin and Tyler Tornabene appeared on behalf of the U.S. Attorney's Office (USAO). All above-listed Defendants were present, represented by counsel.¹ Before the Court were a number of pretrial motions. After reviewing the pleadings and hearing argument, the Court ruled, or took under

¹ Mr. Vovos advised the Court his client, Defendant Hissong, had a family emergency and Defendant Hissong orally waived his presence for the hearing. Accordingly, Defendant Hissong was excused from open court.

1 advisement, all of the outstanding motions. This Order memorializes
2 and supplements the Court's oral rulings.

3 **I. MOTION TO SEVER DEFENDANTS FOR TRIAL**

4 The United States moves to sever the Defendants for trial. The
5 United States is joined in its motion to sever by Defendants Niebuhr
6 and Baird. The United States seeks to sever the Defendants for trial
7 into three, allegedly factually distinct, groupings, in order to
8 better serve judicial economy, allow time for plea negotiations, and
9 focus on separate aspects of the Indictment. Specifically, the United
10 States proposes the following division: Group 1 - The Direct
11 Supervisors for CH2M Hill, Defendants Davis and Livesey; Group 2 - The
12 Persons in Charge at CH2M Hill, Defendants Baird, Hay, Howard,
13 Johnson, and Niebuhr; and Group 3 - The Upper Managers for CH2M Hill,
14 Defendants Dodd, Hissong, and Brannan. Defendants, other than Niebuhr
15 and Baird, oppose severance arguing that the United States has not
16 demonstrated prejudice in proceeding with a joint trial and that
17 judicial economy would not be achieved by severance.

18 Here, the United States properly joined all the Defendants in a
19 single indictment under Federal Rule of Criminal Procedure 8(b), as
20 the acts charged against each Defendant have a logical relationship
21 with the series of acts or transactions constituting an offense
22 charged against the co-defendants. See *United States v. Felix-*
23 *Gutierrez*, 940 F.2d 1200, 1208-09 (9th Cir. 1991). The United States
24 now seeks to sever the ten defendants pursuant to Federal Rule of
25 Criminal Procedure 14, which provides that "[i]f the joinder of
26 offenses or defendants in an indictment . . . appears to prejudice a

1 defendant or the government, the court may order separate trials of
2 counts, sever the defendants' trials, or provide any other relief that
3 justice requires." Under Rule 14, the moving party bears the heavy
4 burden of demonstrating the necessity for severance. *United States v.*
5 *Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1982). There is a preference
6 in the federal system for joint trials of defendants who are indicted
7 together. See e.g., *United States v. Zafiro*, 506 U.S. 534, 536
8 (1993); *United States v. Stinson*, 647 F.3d 1196, 1205 (9th Cir. 2011).
9 Ultimately, the issue of whether to sever under Rule 14 is up to the
10 discretion of the court, unless joinder is "so manifestly prejudicial
11 that it outweighs the dominant concern of judicial economy and compels
12 the exercise of the court's discretion to sever." *United States v.*
13 *Brashier*, 548 F.2d 1315, 1323 (9th Cir. 1976). In determining the
14 prejudicial effect of joint trials the Court is guided by several
15 factors including:

16 (1) whether the jury may reasonably be expected to collate
17 and appraise the individual evidence against each
18 defendant; (2) the judge's diligence in instructing the
19 jury on the limited purposes for which certain evidence may
20 be used; (3) whether the nature of the evidence and the
21 legal concepts involved are within the competence of the
ordinary juror; and (4) whether [Defendants] could show,
with some particularity, a risk that the joint trial would
compromise a specific trial right of one of the defendants,
or prevent the jury from making a reliable judgment about
guilt or innocence.

22 *United States v. Fernandez*, 388 F.3d 1199, 1241 (9th Cir. 2004).

23 Here, these four factors do not weigh in favor of a finding of
24 prejudice. To the first and second factors, as this is a conspiracy
25 case in which each Defendant is charged in 32 of the 34 counts, much
26 of the same evidence would be admissible against each Defendant, even

1 in separate trials. In a joint trial, the jury, far from being unable
2 to evaluate the evidence against each Defendant, will be able to
3 evaluate and assess each Defendant's role in the conspiracy, and their
4 relative level of culpability, if any. As to the third factor, this
5 case is well within the competence of an ordinary juror. In *Baker*,
6 the court noted a distinction between the ability of a jury to
7 understand the conceptually simple matter of narcotics trafficking, as
8 contrasted with a more complex anti-trust case. *United States v.*
9 *Baker*, 10 F.3d 1374, 1388 (9th Cir. 1993)(citing *United States v.*
10 *Casamento*, 887 F.2d 1141, 1150 (2nd Cir. 1989)). Here, while
11 Defendants are charged with numerous counts, each count arises out of
12 the same general conspiracy. The nature of the conspiracy, that the
13 Defendants conspired to bill for more hours than were worked, is
14 certainly within the ability for a jury to comprehend. Finally,
15 having reviewed the parties' briefs and arguments, the United States,
16 and Defendants Niebuhr and Baird, have not demonstrated that specific
17 trial rights would be compromised by a joint trial. Therefore, they
18 have not met their burden of demonstrating that prejudice compels
19 severance.

20 Ultimately, based upon the facts of this case and the arguments
21 presented, the Court finds that judicial economy and the interest of
22 justice would best be served by a joint trial. Accordingly, the
23 United States' motion is denied.

24 **II. MOTION TO MODIFY PROTECTIVE ORDER**

25 Defendant Hissong moves to modify the previous protection order,
26 ECF No. 106. Defendant Hissong is joined by Defendants Dodd, Brannan,

1 and Niebuhr. While all four Defendants reside in the Tri-Cities,
2 Defendant Hissong's counsel, Mr Vovos, is located in Spokane,
3 Defendant Dodd's counsel, Mr. Curtis, is located in Spokane, Defendant
4 Brannan's counsel, Mr. Therrien, is located in Yakima, and Defendant
5 Niebuhr's counsel, Mr. Hershman, is located in Tacoma. These four
6 Defendants seek to modify the previous protection order which required
7 that the Investigative Reports disclosed by the United States could
8 not be shared by defense counsel with the Defendants, except by oral
9 disclosure or by a copy in counsel's presence. Defendants' counsel
10 now seek permission to allow Defendants to have copies of the
11 Investigative Reports, so that they may review them outside of
12 counsels' presence. These Defendants assert the protection order is
13 burdensome given the travel distance required to review the reports
14 with counsel and the time necessary to redact Investigation Report
15 material.

16 The United States objected to the modification, asserting that
17 the public interest outweighs the burden of maintaining the protection
18 order. After holding an *in camera* review, the Court is persuaded that
19 the public interest is best served by maintaining the current
20 protection order. The Court also notes that the issue is mitigated by
21 the offer of Mr. Egan, counsel for Glenda Davis, to allow all
22 Defendants to review the materials at his local office.

23 Accordingly, the Court denies Defendant's motion. The Court
24 also cautions all Defendants that they may not take copies,
25 photocopies, or pictures of the Investigative Reports.

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III. MOTION FOR DISCLOSURE

Defendant Hay moves for pretrial disclosure of all alleged coconspirator statements the United States intends to use at trial. Defendant Hay is joined by Defendants Hissong, Howard, Dodd, Johnson, and Brannan. The United States argues that any coconspirator statements are already provided in discovery and that no legal duty exists to compel them to provide a pretrial list of every potential statement that may be offered as a coconspirator statement.

9 While the Fifth Circuit, in *United States v. James*, 590 F.2d 575
10 (5th Cir. 1979), has established a practice of holding a hearing
11 before the admission of coconspirator statements the Ninth Circuit has
12 clearly declined to follow the Fifth Circuit's holding. See e.g.
13 *United States v. Zemek*, 634 F.2d 1159, 1169 n.13 (9th Cir. 1980) (In
14 discussing *James* the Court noted that, "[i]n light of consistent Ninth
15 Circuit precedent allowing conditional admission, we reject [the]
16 argument for a mandatory pretrial determination"); *United States v.*
17 *Perez*, 658 F.2d 654, 658 n.2 (9th Cir. 1981) ("Unlike the Fifth
18 Circuit, this court has declined to express a 'preference' for
19 pretrial determination of admissibility of the coconspirator's
20 statements."). It is still the clear law of the Ninth Circuit that
21 "[t]he trial judge may make a preliminary determination of
22 admissibility or may admit the testimony conditionally, subject to
23 'connecting up' with the foundation to be eventually laid by the
24 prosecution." *United States v. Gere*, 662 F.2d 1291, 1294 (9th Cir.
25 1981). If the prosecution fails to establish the required foundation
26 for the conditionally accepted statements, the statements are subject

1 to a later motion to strike. See, e.g., *United States v. Watkins*, 600
2 F.2d 201, 204 (9th Cir. 1979); *United States v. Eubanks*, 591 F.2d 513,
3 519 n.6 (9th Cir. 1979); *United States v. Weiner*, 578 F.2d 757, 768
4 (9th Cir. 1978).

5 Additionally, the Court finds no precedent under Federal Rule of
6 Evidence 104 or 801 that require the prosecution to provide pretrial
7 disclosure of statements that may be offered as coconspirator
8 statements at trial. Given the lack of legal authority and the fact
9 that any such statements have been provided in discovery, the Court
10 denies Defendant's motion. However, Defendants may renew challenges
11 to specific coconspirator statements in later motion practice.

12 **IV. MOTION FOR DISCOVERY**

13 Defendant Hay moves for disclosure of all evidence for which
14 disclosure is required under the Federal Rules of Criminal Procedure,
15 Local Rules, the U.S. Constitution, and relevant case law, including
16 *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405
17 U.S. 150 (1972), *United States v. Henthorn*, 931 F.2d 29 (9th Cir.
18 1991), and their progeny. Defendant Hay is joined by Defendants
19 Hissong, Howard, Dodd, Johnson, and Brannan. Defendants also seek a
20 list of percipient witnesses the United States does not intend to call
21 at trial.

22 The United States noted that they have already provided five
23 separate disclosures, including twelve discs with hundreds of
24 thousands of pages of documents and reports, each specifically
25 identifying the information provided and the corresponding Bates
26 range.

1 Accordingly, the Court denies Defendant's motion as moot to the
2 extent Defendant's request is already required by the current Case
3 Management Order. To the extent Defendant seeks discovery consistent
4 with Federal Rules of Evidence 404(b) and 609, *Brady*, *Giglio*,
5 *Henthorn*, the Court grants the motion. To the extent Defendant seek a
6 list of percipient witnesses the United States does not intend to call
7 at trial, the Court denies the motion, but grants leave to renew
8 provided a more specific discrete request is made. Disclosure will be
9 subject to the deadlines set forth in the Court's forthcoming amended
10 case management order.

11 Parties also raised concerns regarding the timing, and ongoing
12 nature of certain disclosure. Accordingly, the Court orders the
13 United States to file, no later than October 18, 2013, a discovery
14 status report providing a realistic assessment of when discovery and
15 document production will be full and complete. Any remaining issue
16 with discovery will be taken up at the First Pretrial Conference.

V. MOTION TO DECLARE CASE COMPLEX

18 Defendant Davis moves for an order declaring the case complex as
19 defined in 18 U.S.C. § 3161(h)(7)(B)(ii). The United States had no
20 objection and no party offered an objection at the September 4, 2013
21 hearing. Accordingly, the motion is granted.

VI. MOTION FOR EXTENSION TO FILE DISCLOSURE OF EXPERT WITNESSES

23 Defendant Dodd moves for an extension of the deadline to file
24 disclosures of expert witnesses. Defendant Dodd is joined by
25 Defendants Brannan, Howard, Livesey, Niebuhr, Johnson, Baird, and
26 Howard. The United States has no objection to the extension or the

1 proposed dates. Accordingly, the motion is granted as to all
2 Defendants. Disclosure is subject to the deadlines set forth in the
3 Court's forthcoming amended case management order.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. Defendants' motions for joinder, **ECF Nos. 136, 137, 140,**
6 **141, 142, 146, 159, 160, 161, 162, 163, 164,** and **165,** are
7 **GRANTED.**

8 2. United States' Motion to Sever Defendants for Trial, **ECF**
9 **No. 122,** is **DENIED.**

10 3. Defendant Hissong's Motion to Modify Protective Order, **ECF**
11 **No 126,** is **DENIED.**

12 4. Defendant Hay's Motion for Disclosure, **ECF No. 132,** is
13 **DENIED.**

14 5. Defendant Hay's Motion for Discovery, **ECF No. 133,** is
15 **DENIED AS MOOT IN PART** (production already required under
16 the case management order), **GRANTED IN PART** (request for
17 discovery consistent with 404(b), 609, *Brady, Giglio,* and
18 *Henthorn*), **AND DENIED,** with leave to renew, as to the
19 remainder. Disclosure is subject to the deadlines set
20 forth in the Court's forthcoming amended case management
21 order.

22 6. Defendant Davis' Motion to Declare Case Complex, **ECF No.**
23 **134,** is **GRANTED.**

24 7. Defendant Dodd's Motion for Extension of Time to File
25 Disclosure of Expert Witnesses, **ECF No. 150,** is **GRANTED.**

1 Disclosure is subject to the deadlines set forth in the
2 Court's forthcoming amended case management order.

3 8. Defense counsel James Egan will serve as lead counsel with
4 respect to all Criminal Justice Act (CJA) budgetary
5 matters, as well as, lead counsel on expert testimony and
6 experts used for discovery data management, that is done at
7 CJA expense.

8 9. Defense counsel James Egan is direct to file a proposed CJA
10 budget by not later than three weeks from the date of this
order.

11 10. USAO shall file, **by no later than October 18, 2013**, a
12 discovery status report, providing a realistic assessment
13 of when discovery and document production will be complete.

14 11. Counsel shall meet and confer, and file, **by no later than**
15 **October 18, 2013**, a joint status report to include 1) a
16 proposed draft pretrial jury questionnaire, 2) a
17 recommendation for the number of preemptory challenges, 3)
18 the proposed length for voir dire and opening statements,
19 and 4) whether a new trial date of March 3, 2013, (starting
20 the trial a week earlier) would be acceptable. Parties are
21 directed, as discussed in the hearing, to use *United States*
22 *v. Olsen*, CR-11-6001-EFS, as a guiding example.

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IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 19th day of September 2013.

s/ Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge